COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Whether the jurisdiction of Your Honorable Court has been invoked in a timely and appropriate manner?

II. Assuming arguendo that Question I is answered in the affirmative, whether the Pennsylvania Supreme Court failed to comply with the remand order of this Honorable Court?

ARGUMENT

I. WHETHER THE JURISDICTION OF YOUR HONORABLE COURT HAS BEEN INVOKED IN A TIMELY AND APPROPRIATE MANNER?

Respondents submit that the jurisdiction of this Honorable Court is not properly invoked since contrary to the statement contained in Paragraph 1 of the "Statement of Jurisdiction", the writ of certiorari was not filed within ninety (90) days of January 24, 1974, the date of the entering of the opinion of the Supreme Court of Pennsylvania. On the contrary, the record indicates that the petition was docketed in the Supreme Court of the United States on the 25th day of April, 1974. It is respectfully submitted, that the last day for filing was April 24, 1974; and that, therefore, Petitioner has failed to comply with the mandatory provisions of the applicable statute, 28 USCA, Sec. 2101.

Further, Respondents submit that the opinion of the Supreme Court of Pennsylvania in response to the remand order of this Honorable Court is not properly subject to review under 28 USCA, Sec. 1257(3) as we assume Petitioner intends to aver, since that opinion specifically disclaims reliance upon any federal ground whatsoever; and therefore is outside the scope of the said statutory section and not subject to challenge by Petitioner.

Argument

II. ASSUMING ARGUENDO THAT QUESTION I IS ANSWERED IN THE AFFIRMATIVE, WHETHER THE PENNSYLVANIA SUPREME COURT FAILED TO COMPLY WITH THE REMAND ORDER OF THIS HONORABLE COURT?

In its addendum opinion filed January 24, 1974 with but one dissenting vote, the Supreme Court of Pennsylvania responded to the inquiry of this Honorable Court as to "consider whether its judgments are based on Federal or State constitutional grounds, or both." The Court stated in its per curiam opinion "There are, of course, indications in some of the opinions supporting our judgments that a basis for the judgments was to be found in Federal constitutional problems. However, there are also separate reasons advanced for the result that do not stand on a view of Federal Constitutional requirements." (Appendix C of the Petition, p. 60). A reading of the various opinions supports that position. The Pennsylvania Supreme Court carefully stated its concensus that in considering the questions put to it as to the ground of decision, that it had not rested its decision on either Federal or State constitutional standards, but rather considered that decision to rest on a determination that the State law of Pennsylvania beyond the minimal requirements of the Federal or State Constitution required the result. In so doing, the Court cited numerous cases in holding "Our supervisory power over state criminal proceedings is broad, and this Court need not, as a matter of State law, limit its decision to the minimum requirements of Federal Constitutional law." (Appendix C of Petition, p. 60.)

Argument

There can be little doubt of the Supreme Court of Pennsylvania's power to so decide.

Petitioner's argument apparently boils down to two points. First, that the opinion is not responsive to the terms of the remand order. That position, of course, begs the question, since if the prior decision of the Pennsylvania Supreme Court is deemed to have been decided purely on the basis of solely non-constitutional state grounds, the inquiry of this Honorable Court has been entirely answered. Secondly, the Petitioner falls back on the ". . . clear meaning which your Petitioner gleans from the original holding of the Pennsylvania Supreme Court . . ." We submit that Petitioner is presumptuous in asserting that not only is its interpretation the only one possible, but in its ascribing devious and sinister motivations to the members of the highest Court of this Commonwealth in viewing their decision as an attempt to "abrogate the fundamental concept of Federalism which underlies our union. . ." The question really becomes whether the Pennsylvania Supreme Court's interpretation of its own decision may be challenged on the basis of motivation and credibility. Were the State Supreme Court interpreting a State statute that interpretation would certainly be conclusive. *Cramp v. Board of Public Instruction of Orange County,* 82 S. Ct. 278, 368 U.S. 278; *Garner v. State of La.,* 82 S. Ct. 248, 368 U.S. 157; *Beiland v. Board of Public Education, School District of Philadelphia,* 78 S. Ct. 1317, 357 U.S. 399, rehearing denied 79 S. Ct. 10, 358 U.S. 858. We submit that a fortiori here where the same Court which decided the case was asked to express the intent and ground of that decision and with the joinder of all but the Justice who

dissented in the original case, states precisely what that ground and intent was, we find it beyond logical comprehension to consider such statement anything but conclusive unless as Petitioner seems to indicate, the credibility of the Supreme Court of Pennsylvania is an issue.

Respondents respectfully submit that that review by your Honorable Court directed to such an issue would indeed "abrogate the fundamental concept of Federalism which underlies our union . . ." for which Petitioner expresses so much concern.

CONCLUSION

The below-named Respondents, for the reasons above stated, respectfully request that the petition for certiorari in this matter be denied, or that the decision of the Pennsylvania Supreme Court be affirmed.

Respectfully submitted,

EMMANUEL H. DIMITRIOU,
635 Walnut Street,
Reading, Pennsylvania,
G. ALAN KRAMER,
635 Walnut Street,
Reading, Pennsylvania,
Attorneys for Respondents: Roger Smith, Leroy Stoltzfus, Jr., Charles Corman, Robert A. Marcinkowski, Charles Ginder.